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IN THE

# *Supreme Court of the United States*

OCTOBER TERM, 1940

## *No. 921*

FUNKS GROVE GRAIN COMPANY,
*Petitioner,*

vs.

THE ALTON RAILROAD COMPANY.
*Respondent.*

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**BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

## OPINION BELOW.

MAY IT PLEASE THE COURT:

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in the advance sheets, 117 F.(2d) 210. The District Court did not write an opinion.

## STATEMENT OF THE CASE.

This case involves a claim for the enforcement of a reparation award entered by the Illinois Commerce Commission in favor of petitioner, a corporation engaged in the coal business at Funks Grove and McLean, Illinois.

(R. 2-3, 38-40, 100) The award was predicated on the collection by the Receivers of the properties of The Chicago and Alton Railroad Company of allegedly excessive rates on Illinois intrastate shipments of coal. (R. 119-29, 218, 281) The claim was filed in the receivership proceeding of The Chicago and Alton Railroad Company, and was there defended by respondent, the assignee of the purchasers at judicial sale of the railroad properties. (R. 2, 41-47, 77, 281) A judgment enforcing the award was entered by the District Court against respondent on May 8, 1940 (R. 258-9), and this judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit on December 14, 1940, in an opinion (R. 281-90) which contains an able and clear analysis of the pertinent provisions of the Illinois law and decisions.

The case before the Illinois Commerce Commission arose on complaints of petitioner and other coal dealers against a large group of common carriers by rail, including the Receivers of The Chicago and Alton Railroad Company. (R. 98-100, 218, 282) The complaints alleged that the rates charged for the transportation of bituminous coal from mines at Lincoln and Springfield, Illinois, to various Illinois destinations were excessive, unjust, unreasonable and discriminatory. (R. 99, 218, 282) The rates complained of were at all times within the limits of the Commission's own schedule of reasonable maximum rates. (R. 104, 204, 285)

On May 26, 1931, the Commission entered an order covering shipments transported by the Receivers of The Chicago and Alton Railroad Company. (R. 98-117, 282) This order did not, as asserted by petitioner (Petition 3), find "what would have been the just, reasonable and non-discriminatory rates which should have been charged for such shipments," but merely found that

the just, reasonable and non-discriminatory rates "are" (*i. e.*, on May 26, 1931) certain stated amounts. (R. 115) This finding did not in any way relate to the past, or to any shipment which had theretofore been made. (See report of Special Master Lundahl, R. 21-22, 28-32) In the order the Commission concluded that reparation "should be awarded" on shipments previously made, but that the complainants and the carriers should compromise the reparation claim. (R. 115, 282) The Commission also found that petitioner and other complainants had paid and borne "unjust, unreasonable and excessive freight charges," and were "entitled to an award of reparation," but made no finding that any rate assessed in the past was unjustly discriminatory. (R. 116) The order required the defendant carriers to establish rates for the future, and directed the parties to compromise the reparation claim. (R. 116-17, 282)

Shortly after the entry of that order, namely, on July 18, 1931, respondent acquired the properties of The Chicago and Alton Railroad Company as assignee of the purchasers thereof at judicial sale. (R. 77, 281-2) The decree of foreclosure and sale provided that the purchaser or its assignee should pay all unpaid liabilities of the Receivers incurred in the operation of the railroad. (R. 93-94, 282) Petitioner filed its claim based on the Commission's order of May 26, 1931, and respondent filed a motion to dismiss the claim. (R. 2-3, 219, 282) The claim was referred to Herbert A. Lundahl, Special Master, who rendered a report in which he found that the Commission's order of May 26, 1931, was not an enforceable award of reparation, and recommended that the motion to dismiss be granted. (R. 17-34, 282)

Petitioner and other claimants thereafter secured a reopening of the proceeding before the Commission. (R. 78, 130, 181-92, 282-3) After further hearings, the Commission on March 17, 1939, entered a reparation order in

favor of petitioner and others. (R. 119-29, 283) This order found that petitioner had paid "unjust, unreasonable and excessive freight charges" (R. 125), and awarded reparation "on account of the collection by said Receivers of unjust, unreasonable and excessive charges." (R. 128) The order contains no finding of unjust discrimination. The shipments covered by the award in favor of petitioner all originated at Springfield, Illinois, and were consigned to McLean and Funks Grove, Illinois, 44.2 and 48.8 miles, respectively, northeast of Springfield.* (R. 5, 12-15, 104, 215)

After the entry of the reparation award, the District Court gave petitioner leave to file an amendment to its claim based on the award, and vacated the report of Special Master Lundahl, which had not been acted upon and did not cover the amended claim. (R. 34-35, 37, 283) Respondent filed an answer to the amended claim, and petitioner a reply. (R. 41-48, 283) Petitioner's amended claim and other similar claims were referred to Master Charles A. McDonald for hearing and report. (R. 48, 283) The claim of one claimant, Frank Cheek, was heard first, and by stipulation it was agreed that the record on that claim should be considered and taken as the record on the other claims. (R. 56-57, 95-97, 220) The Master, in his several reports, recommended that the claims be allowed (R. 217-26, 248-51, 283), and the District Court entered an order approving both reports and adopting the findings and conclusions of the Master. (R. 257-8, 283) On appeal the Circuit Court of Appeals for the Seventh Circuit held that since the rates found excessive by the Commission were at all times within the limits of the Commission's own

* The list of shipments attached to the original claim also show cars from Sherman, Selbytown and Williamsville, Illinois, but these shipments were eliminated by the Commission in its order of March 17, 1939, because they originated at points not involved in the complaint filed with the Commission. (R. 6-11, 123)

schedule of reasonable maximum rates (R. 104, 204, 285), the Commission was without power to repeal its own enactment with retroactive effect, and reversed the judgment of the District Court. (R. 285-90)

In the argument which follows, we reply under Sections I and II to the argument advanced by petitioner in support of the petition for certiorari, and in Sections III and IV give additional reasons for denial of the writ.

## SUMMARY OF ARGUMENT.

### I.

The decision of the Circuit Court of Appeals is not in conflict with applicable local statutes or applicable decisions.

The rates assessed on every one of petitioner's shipments did not exceed the Illinois Commerce Commission's own schedule of reasonable maximum rates prescribed pursuant to the requirements of an act of the Illinois Legislature. Under the decisions of the Supreme Court of Illinois, a rate which, when assessed, does not exceed the Commission's schedule of reasonable maximum rates is a just and reasonable rate, and may only be reduced by an order running to the future. A rate which exceeds the schedule is prima facie unreasonable, but the carrier may show that the rate was in fact reasonable.

The order of the Commission prescribing the schedule was an enactment legislative in character.

The administrative views of the Commission with respect to the legal effect of its schedule of reasonable maximum rates have no authoritative value.

The legal effect of the schedule of reasonable maximum rates prescribed by the Commission cannot be avoided by calling the tariff rates which were assessed carrier-made rates.

The Commission did not award reparation for unjust discrimination, and petitioner's claim filed in the District Court was not based on that ground. There is therefore no question of discrimination presented.

## II.

The decisions of the Circuit Court of Appeals for the Fifth Circuit cited by petitioner have no bearing on the issue in the present case. The orders of the Interstate Commerce Commission involved in the cases decided by the Circuit Court of Appeals for the Fifth Circuit did not fix, or even purport to fix, reasonable maximum rates, whereas the order of the Illinois Commerce Commission here involved specifically fixed certain named rates as reasonable maximum rates.

## III.

The reparation award is ineffective and void because the conclusion of the Illinois Commerce Commission that the rates under attack were excessive is not based upon sufficient findings of fact.

The Illinois Public Utilities Act, as construed by the highest court of the State, requires that an order of the Commission be based upon specific findings of fact which afford a reasonable basis for the order. The portions of the orders of the Illinois Commerce Commission specifically designated as its findings, insofar as they relate to the reasonableness of the assailed rates, are mere conclusions, which, under the decisions of the Supreme Court of Illinois, are not sufficient to support an order. Resort may not be had to discussion of the evidence contained in the orders to supply the deficiencies in the findings.

Even if the discussion of the evidence be treated as a series of findings, it is insufficient to support the reparation award. The orders of the Commission disclose three possible bases for the final conclusion that the rates were excessive. The first—a comparison of the per-

centage of increase of the rates complained of with the percentage of increase of rates generally from 1917 to some undisclosed later date—was expressly stated by the Commission as not being sufficient, in itself, to show that any rate was too high. The second possible basis—comparison of the assailed rates with other rates—does not support the award because the Commission failed to make a complete statement of the transportation conditions affecting the assailed rates and the compared rates. Such findings are indispensable under the decisions of the Supreme Court of Illinois. The third possible basis—an inference that other carriers compromised the claims made against them—admittedly is not based on evidence of record, and is obviously not a proper foundation for the award.

## IV.

The award is arbitrary and unreasonable because the Illinois Commerce Commission failed to test the reasonableness of the assailed group rates by average group distances, although the Commission itself stated that the proper method to test group rates was by comparisons based on the average distances from the rate group.

## ARGUMENT.

### I.

**The conclusion of the Circuit Court of Appeals that the Illinois Commerce Commission has no power to award reparation with respect to rates which did not exceed its own schedule of reasonable maximum rates is not in conflict with applicable local statutes or applicable decisions.**

There have been three tribunals in Illinois having jurisdiction over rates of common carriers by rail. The first was the Railroad and Warehouse Commission, created in 1871. (Ill. Laws 1871, p. 618) This commission had no power to award reparation. One of its principal functions was the promulgation of schedules of reasonable maximum rates, and the revision thereof from time to time, pursuant to Section 8 of An Act to prevent extortion and unjust discrimination, which was adopted in 1873 to carry out mandates imposed by the Illinois Constitution, and is still in force. (Ill. Rev. Stat. 1939, c. 114, sec. 125; and pp. 61-62, Ill. Const. Art. 11, secs. 12 and 15) The second regulatory commission was the Public Utilities Commission, created by the Public Utilities Act of 1913. (Ill. Laws 1913, p. 460) In 1921, the present Public Utilities Act was adopted, which created the Illinois Commerce Commission. (Ill. Rev. Stat. 1939, c. 111⅔) The provisions of the two public utility acts, in so far as they are here pertinent, are identical. The power and duty of the Railroad and Warehouse Commission under the Act of 1873 to prescribe and revise schedules of reasonable maximum rates were transferred to the Public Utilities Commission by the Act of 1913 (Ill. Laws 1913, pp. 501-2), and to the

Illinois Commerce Commission by the Act of 1921. (Ill. Rev. Stat. 1939, c. 111⅔, sec. 91)

Pursuant to the statutory delegation, the Illinois Commerce Commission has from time to time established schedules of reasonable maximum rates. (R. 193-6) The rates assessed by the Receivers of The Chicago and Alton Railroad Company on the shipments covered by the reparation award were all within the limits of the effective schedule of reasonable maximum rates,* as the Commission itself stated in its order of May 26, 1931. (R. 104) Throughout its petition, petitioner impliedly concedes that it was at no time charged a rate exceeding the Commission's schedule.

**1. The Illinois Commerce Commission's schedule of reasonable maximum rates is not merely prima facie evidence of the reasonableness of rates assessed in the past in a proceeding before the Commission.**

Petitioner argues at length (Petition 15-19) that by the Act of 1873 the Commission's schedule of reasonable maximum rates is nothing more than prima facie evidence of reasonableness in a reparation proceeding before the Commission, and states (Petition 16) that Section 72 of the Public Utilities Act "gave the Commission the right to award reparation against *any rate* which is excessive." Section 72 empowers the Commission to award reparation only in case it "has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount." (Ill. Rev. Stat. 1939, c. 111⅔, sec. 76) As we have previously pointed out (*supra,* pp. 2-4), the Commission did not find that petitioner paid unjustly discriminatory rates, nor award reparation on that ground. The real

* The assailed rates and the distances for which they applied are shown in the Commission's order of May 26, 1931 (R. 104), and the reasonable maximum rates fixed by the Commission are shown in Exhibit D. (R. 204)

question, therefore, is not whether the power to award reparation for excessive charges exists, but whether the Commission, in determining whether a rate was "excessive," may disregard its own previously fixed and effective standards of reasonableness.

As the Circuit Court of Appeals pointed out (R. 288-9), when an administrative body prescribes a reasonable maximum rate for the future it performs a function legislative in character, and when it sits to award reparation the nature of its function is judicial. This distinction was explicitly recognized by the Illinois Appellate Court in *Marion & Eastern R. R. Co.* v. *Illinois Central R. R. Co.,* 245 Ill. App. 83, 90-91, where it cited the decision of this Court in *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. R. Co.,* 233 U. S. 479.

The provision in the Act of 1873 that the schedules of reasonable maximum rates shall "be deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed are reasonable maximum rates of charges," on which petitioner relies (Petition 17), has no bearing on the power of the Commission to award reparation, but, in terms, relates to suits in the courts. The act defined "extortion" as the charging of more than "a fair and reasonable rate," and authorized penalty suits by the State and damage suits by shippers based on extortion. (Ill. Rev. Stat. 1939, c. 114, secs. 118, 121-4)

In its opinion (R. 287-8), the Circuit Court of Appeals pointed out that the Supreme Court of Illinois in *Chicago, Burlington & Quincy R. R. Co.* v. *The People,* 77 Ill. 443, construed the Act of 1873 as imposing "no liability for unreasonable charges 'for taking the rates fixed by the schedule, or less rates, * * * even though proof might be made that the rates so taken were more than fair and reasonable rates.' " The Illinois Court, at pages

448 and 449, expressly held "that the declaration was * * * defective in not averring that a schedule of rates had been established by the board of commissioners, and that the defendant [carrier] had received compensation in excess of those rates." The contention of the State "that the statutory offense consists simply in receiving more than a fair and reasonable rate of compensation, and that the schedule of rates is but *prima facie* evidence of what is reasonable" was expressly rejected; and the Court said "the schedule of rates is something more than evidence—it is a fact upon which the action rests."

The contention is made (Petition 33-34) that *Chicago, Burlington & Quincy R. R. Co.* v. *The People, supra,* is not in point because "No question of reparation was involved in the case." It is true that the suit was not brought by a shipper; but since the Court held that the State could not recover penalties for extortion if the rates charged were within the limits of the Commission's schedule, it necessarily follows that a shipper could not recover damages for extortion in a like situation.

The effect of the schedule in a suit by a shipper was made clear by the Supreme Court of Illinois in *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361. In that case the earlier decision in *Chicago, Burlington & Quincy R. R. Co.* v. *The People, supra,* was expressly approved, and the Court, at page 375, added:

> "The statutory counts of the declaration in the case at bar contain an averment, that a schedule of rates had been established by the board of commissioners, and that the defendant [carrier] had received compensation in excess of those rates. It thus avoids the defect, for which the declaration in *C. B. & Q. R. R. Co.* v. *The People, supra,* was condemned."

The discussion in the opinion in the *Jones Case* concerning the clause in the statute making the schedule prima facie evidence in suits in the courts was in answer to the contention of the carrier that the statute was unconstitutional. The Court held, at pages 380, 381 and 383, that since the statute merely made a rate in excess of the schedule prima facie unreasonable, and gave the carrier the opportunity to show that the rate was in fact reasonable, the carrier's constitutional right to a judicial determination was not infringed.

In an attempt to escape the plain fact that the Court in the *Jones Case* held that a shipper had no claim unless the carrier had exacted rates exceeding the schedule, petitioner states (Petition 32-33) that since the last count of the amended declaration was not based on the Act of 1873, but merely averred liability for charging unreasonable rates, and since the judgment was in odd numbers, it must be concluded that the judgment was "for reparation under the last count." Section 6 of the act, set forth on page 372 of the opinion, provided that a carrier exacting an extortionate charge would be liable to the shipper for treble damages, and not for a fixed penalty; hence no significance can be attached to the amount of the judgment. It is clear that the judgment could only have been rendered on the counts grounded upon the Act of 1873; for the Court sustained the validity of that act against the carrier's claim of unconstitutionality, and held at pages 397 and 398, on an assignment of cross-error by the shipper, that the last amended count was barred by the statute of limitations.

The question of the legal effect of the reasonable maximum schedule was again before the highest Court of Illinois in *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co.*, 278 Ill. 58, which is reviewed in the opinion below. (R. 289-90) Petitioner asserts (Petition 36)

the Illinois Supreme Court held that the action of the Public Utilities Commission in suspending rates within the limits of the schedule was valid, and that in adopting the schedule the Commission "was merely establishing a rule of evidence between litigants"; and further asserts (Petition 38-39) that, since reparation was not involved, the statement of the Court that the carriers had the right to establish and collect rates within the limits of the schedule was merely dictum.

Careful analysis of the opinion in *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co., supra,* will show that the Court held that rates within the limits of the schedule were lawful, *i. e.,* reasonable, rates which could only be changed for the future. The tariffs naming the increased rates were filed with the Railroad and Warehouse Commission, and suspended by it until January 8, 1914. On January 1, 1914, the Public Utilities Act of 1913, which created the Public Utilities Commission, became effective, and the new Commission entered an order further suspending the tariffs. The rates named in the tariffs did not exceed a schedule of reasonable maximum rates prescribed by the Railroad and Warehouse Commission which was continued in force by a saving clause in the Act of 1913. At page 69 the Court declared that there could be no question as to the right of the carriers to file tariffs naming rates within the limits of the schedule and "collect for freight transported accordingly." The Court stated, at page 70, that "the Railroad and Warehouse Commission had no power to arbitrarily suspend the rates in question and the Public Utilities Commission had no power, by its order of January 6, 1914, to suspend such rates, or to suspend them at all except after a hearing and taking evidence," but added that since the railroads had acquiesced in the void suspension orders, the Court would treat the case as one arising on complaint. At page 71, the Court said:

> "* * * maximum rates having been fixed and the order fixing such rates being still in force, any rates fixed by the railroads lower than the rates fixed by the commission would be lawful and reasonable charges, and the burden would be on the parties in interest protesting against such rates to establish the contrary. In other words, the question really before the Public Utilities Commission was not a question of raising rates but a question of lowering rates which the railroads might lawfully establish."

**2. The order of the Illinois Commerce Commission prescribing a schedule of reasonable maximum rates was a legislative act.**

The argument made by petitioner (Petition 20-24) that the order of the Commission fixing reasonable maximum rates was not a legislative act is primarily rested upon a statement in the opinion in *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361, 382, that "there is no delegation to the board of the legislative power to establish rates." (Petition 20) The order fixing reasonable maximum rates, of course, was not an act of the Legislature itself, but it was an enactment, legislative in character, of an administrative body acting under and pursuant to a statute conferring power to adopt schedules of reasonable maximum rates.

The passage quoted by petitioner from the *Jones Case* is part of a discussion, appearing on pages 376-382 of the opinion, in which the Court held that Section 8 of the Act of 1873 was not an attempted delegation of legislative power, and the language quoted must be read in the light of the question to which it was addressed. When the discussion is read as a whole, it is clear that the Court had in mind the distinction between the power to make laws, which the Legislature cannot delegate, and the power of the Legislature to authorize administrative tribunals to adopt regulations and orders legislative in

character under standards declared by the Legislature.* Thus, at page 378, the Court said "the legislature may authorize others to do things which it might properly, but can not conveniently or advantageously, do itself."

The *Jones Case* was decided at a time when the nature of the functions of rate regulatory bodies was not so clearly understood as it is today. *Cf. United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 353, note 16. In later decisions the Supreme Court of Illinois has made it clear that the prescription of rates operative in futuro is legislative action. Thus in *Public Utilities Commission* v. *Springfield Gas Co.,* 291 Ill. 209, 213, the Court stated that the Commission in fixing rates acts "under authority delegated by the legislature"; and in *Indiana Harbor Belt R. R. Co.* v. *Commerce Commission,* 340 Ill. 304, 306, the Court declared:

> "The power to fix rates is legislative, whether exercised by the legislature directly or by an administrative body under delegated authority."

The argument made by petitioner is refuted by the actual decisions in *Chicago, Burlington & Quincy R. R. Co.* v. *The People,* 77 Ill. 443, and *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361, where, as we have shown (*supra,* pp. 11-12), the Supreme Court of Illinois held that a condition precedent to liability for penalties or damages under the Act of 1873 was the exaction of rates in excess of the Commission's schedule. It would be strange for the Court to so hold if the schedule were not a legislative act. The argument is further refuted in *People* v. *Brady,* 271 Ill. 100, cited by petitioner (Petition 21), where the Court, at page 105, specifically stated that the *Jones Case* was one in which an act of the Legislature "was upheld as not being an attempted delega-

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* This distinction has been pointed out by the Supreme Court of Illinois in many decisions. See, *e.g., Parks* v. *Libby-Owens-Ford Glass Co.,* 360 Ill. 130, 147-8; *City of Chicago* v. *Ben Alpert, Inc.,* 368 Ill. 282, 288; *People* v. *Building & Loan Ass'n.,* 369 Ill. 518, 527.

tion of legislative power," and, at page 106, that there is a "line which separates legislative power to make laws from administrative authority to make regulations or apply the legislative provisions."

The case of *Public Utilities Commission* v. *C. & W. T. Ry. Co.*, 275 Ill. 555, cited by petitioner (Petition 22-23), did not involve the Act of 1873. The issue was the validity of a temporary order prescribing passenger rates *for future application*, and a reasonable maximum rate within the meaning of the Maximum Fare Law of 1907 was described, at page 569, as "a reasonable limit" beyond which neither the railroads nor the Commission itself could go in fixing rates. The question of the power of the Commission to annul its own rate orders retrospectively was not presented. The Court's statement that the Commission could fix a rate lower than the statutory maximum "if the evidence shows that a lower rate is just and reasonable and sufficient" must be considered in the light of the fact that the Court had before it an order running to the future.

In *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 386-9, cited in the opinion below (R. 288-9), this Court held that when the Interstate Commerce Commission fixed a maximum reasonable rate for the future it performed an act legislative in character, and that in a subsequent proceeding, when sitting in a quasi-judicial capacity to award reparation, "it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect."

Petitioner does not challenge the correctness of the decision in the *Arizona Grocery Case*, but argues (Petition 42-43) that the case is distinguishable because the earlier order fixing a maximum reasonable rate was entered upon complaint, whereas the Illinois Commission

acted upon its own motion in prescribing reasonable maximum rates. We have already shown that in prescribing a schedule of reasonable maximum rates the Illinois Commission exercises a function legislative in character. The fact that the Illinois Commission acted on its own motion does not destroy the legislative character of its order. *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 353-4; *Texas Steel Co.* v. *Ft. Worth & D. C. Ry. Co.*, 45 S. W. (2d) 794, 796 (Tex.).

**3. The views of the Illinois Commerce Commission as to the legal effect of its schedules of reasonable maximum rates have no authoritative value.**

After pointing out that the Illinois Commerce Commission in its order of May 26, 1931, stated that the rates complained of were the same or somewhat lower than the reasonable maximum schedule, and that for this reason the burden of proof was upon complainants, petitioner cites *Commerce Commission* v. *C. C. C. & St. L. Ry. Co.*, 320 Ill. 214. (Petition 24-25) An examination of the opinion in that case discloses that neither the schedule nor the administrative views of the Commission concerning it are mentioned. The order of the Commission directed the carrier to establish a rate for the future, and to file a statement of the amount of reparation due the shipper in accordance with the Commission's findings, but no reparation award was made.

Decisions of the Commission are cited (Petition 25-26) in an effort to show that it has construed the Illinois statutes as authorizing it to repeal its own enactments with retroactive effect. The Supreme Court of Illinois has held, however, that decisions of public service commissions are not considered authority on questions of law. *City of Elmhurst* v. *Western Gas Co.*, 363 Ill. 144, 147. The Interstate Commerce Commission for many years thought that it had power to nullify its own rate

orders retrospectively, but this Court held otherwise in the *Arizona Grocery Case,* 284 U. S. 370.

Several decisions of the Illinois Commission are cited in an attempt to show, as a fact, that the Commission did not contemplate that the schedule should be applied on coal, and that the schedule was made higher than it would otherwise have been made in order to avoid disrupting the group system of rates. These particular decisions do not appear of record, and, for that reason alone, cannot be used as evidence of the correctness of the alleged facts recited therein. *Rockwell Lime Co.* v. *Commerce Commission,* 373 Ill. 309, 320-1; *Chicago & E. I. Ry. Co.* v. *Commerce Commission,* 341 Ill. 277, 285; *Atchison, T. & S. F. Ry. Co.* v. *Commerce Commission,* 335 Ill. 624, 635-6, 638, 640, 645; *cf. Robinson* v. *B. & O. R. R. Co.,* 222 U. S. 506, 512.

Even if the rule were otherwise, petitioner could not, by quotations from other decisions, impeach the legal effect of the schedule. On the cover page of the order prescribing the schedule, and in the order itself, the Commission specifically described the schedule as a "schedule of reasonable maximum rates of charges for the transportation of freight." (R. 193, 195, 196, 198) The Act of 1873 is controlling on the question of the legal effect of the schedule, and it declares that the rates in the schedule shall be "reasonable maximum rates of charges." (Ill. Rev. Stat. 1939, c. 114, sec. 125)

**4. The legal effect of the schedule of reasonable maximum rates cannot be avoided by calling the tariff rates assessed carrier-made rates.**

It is argued (Petition 43-46) that although "a Commission-made rate is a legislative act, preventing reparation," nevertheless "a carrier-made rate is always open as to its reasonableness when charged." Counsel for petitioner permit their reasoning to be confused by

labels. In *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.,* 284 U. S. 370, the maximum reasonable rate prescribed by the Interstate Commerce Commission was 96.5 cents. The carriers never published this rate. They first published 96 cents, thereafter 86.5 cents, and still later 84 cents. The two rates last named were the ones as to which reparation was awarded, although neither had been fixed by any order of the Commission; yet it was held, at page 389, that the carriers were entitled to rely upon the Commission's declaration as to what would be a maximum reasonable rate, and were entitled to protection when they published rates within the maximum limit prescribed. In *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co.,* 278 Ill. 58, 69, 71, the Supreme Court of Illinois likewise held that rates within the limits of the Illinois Commission's own schedule of reasonable maximum rates were lawful rates which the carriers had the right to file and assess.

The decision of the Supreme Court of Iowa in *Barris* v. *C. B. & Q. R. R. Co.,* 102 Iowa 375, cited by petitioner (Petition 44-45), cannot be regarded as an authority on Illinois law in view of the clear expressions of the Supreme Court of Illinois in *Chicago, Burlington & Quincy R. R. Co.* v. *The People,* 77 Ill. 443, 447-9; *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361, 375; and *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co.,* 278 Ill. 58, 69, 71, all of which were carefully considered and reviewed by the Circuit Court of Appeals. (R. 288-90)

**5. The question of discrimination is not presented.**

In a desperate effort to persuade this Court that the Circuit Court of Appeals erred, attention is called (Petition 41-42) to a statement in *Public Utilities Commission* v. *Atchison, T. & S. F. Ry. Co.,* 278 Ill. 58, 69, that under the reasonable maximum schedule "there might

be some individual cases of discrimination that would be cause for complaint and investigation," and it is asserted that the Court below erred in failing to sustain the reparation award upon that ground. In our statement of the case (*supra,* pp. 2-4) it is pointed out that reparation was not awarded on the ground of unjust discrimination. Petitioner's claim, moreover, is not based on unjust discrimination. The original claim, based on the Commission's order of May 26, 1931, was for the difference between "unreasonable rates collected" and "rates found reasonable by the Commission," as shown on Exhibit B to the claim, plus interest and attorneys' fees. (R. 3) The amended claim, which alleges the reparation award of March 17, 1939, expressly states, in paragraph (6), that the Commission found petitioner was entitled to recover "the sum of $1211.46 as reparation and damages due on account of the collection of unjust, unreasonable and excessive charges," and claim is made for that sum together with interest and attorneys' fees. (R. 39-40)

## II.

**The decisions of the Circuit Court of Appeals for the Fifth Circuit cited by petitioner have no bearing on the issue in the case at bar.**

By way of laying a foundation for citing several decisions in the Fifth Circuit upon which it relies, petitioner asserts (Petition 28) that the reasonable maximum schedule order "was entered as a mere approval of the carriers' request for statewide readjustment of the war rates, to conform with a like order of the Interstate Commerce Commission * * *, and does not pretend to pass upon any specific rates." The most casual inspection of the order will show that the rates were prescribed by the Illinois Commission after a hearing on its

own citation against the carriers to show cause why the schedule in effect on June 20, 1922, should not be reduced by ten per cent. (R. 194) There is nothing in the order to indicate that any of the carriers wanted the rates reduced; and the order shows on its face that the Illinois Commission found that the rates in the schedule should be lowered, and prescribed a new schedule of specific rates for specified distances. (R. 194-6, 203-5)

The decisions of the Circuit Court of Appeals for the Fifth Circuit in *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. (2d) 443, and *Texas & Pacific Ry. Co.* v. *Louisiana Oil & Refining Co.*, 76 F. (2d) 465, cited by petitioner (Petition 30-32), hold that general permission given by the Interstate Commerce Commission to carriers to make percentage increases in their tariff rates, and blanket directions to make percentage reductions in such rates, do not constitute an approval or prescription of reasonable maximum rates. The orders of the Federal Commission involved in those cases did not fix, or even purport to fix, reasonable maximum rates.

In its order prescribing a schedule of reasonable maximum rates the Illinois Commission did not deal with the published tariff rates of the railroads, but solely with its own schedule. It entered no blanket order directing a reduction of ten per cent in the various rates named in the carriers' tariffs, irrespective of what they might be, but prescribed as reasonable maximum rates certain specific amounts for specified distances. (R. 196, 203-5)

The difference between the orders of the Interstate Commerce Commission involved in the Fifth Circuit cases and the order of the Illinois Commission fixing reasonable maximum rates makes it clear that the decisions of the Circuit Court of Appeals for the Fifth Circuit were not based "on the same matter," within the meaning of Rule 38 of this Court, as the decision of the

Circuit Court of Appeals for the Seventh Circuit which petitioner challenges. The *Eagle Cotton Oil Case,* moreover, was cited to this Court by counsel for the shipper in the *Arizona Grocery Case,* 284 U. S. at 373, 374, but apparently was not deemed in point because it is not cited in this Court's opinion.

## III.

**The reparation award is ineffective and void because the conclusion of the Illinois Commerce Commission that the rates under attack were excessive is not based upon sufficient findings of fact.**

In *Rockwell Lime Co.* v. *Commerce Commission,* 373 Ill. 309, the Illinois Supreme Court discussed the requirements of Section 65 of the Public Utilities Act (Ill. Rev. Stat. 1939, c. 111⅔, sec. 69), saying (p. 322):

> "Section 65 of the Public Utilities act requires the Commerce Commission, at the conclusion of a hearing upon any complaint, to make and render findings concerning the subject matter and facts inquired into and to *enter its order based thereon.* This court has on numerous occasions announced that the findings of the Commerce Commission under section 65 *must be sufficiently specific* to enable an intelligent review of the commission's decision and to ascertain whether the facts, as found, *afford a reasonable basis for the order entered.* [Citations] When an administrative agency is required, as a condition precedent to an order, to make a finding of facts, *the validity of the order must rest upon the needed finding. Where lacking, the order, it follows necessarily, is ineffective.*" (Italics ours.)

The award made by the Commission on March 17, 1939, even when read together with its order of May 26, 1931, fails to comply with Section 65, and is therefore ineffective and void.

**1. The findings made by the Illinois Commerce Commission respecting the reasonableness of the assailed rates are merely conclusions.**

The 1931 order contains twenty-one pages devoted to a history of the litigation and a discussion of the evidence, followed by four findings, specifically designated as such, and the ordering paragraphs. (R. 98-117) The award of 1939 contains six pages devoted to preliminary discussion, and five findings, specifically designated as such, together with the ordering paragraphs. (R. 111-29) The only findings made with respect to the reasonableness of the assailed rates during the reparation period are the finding in the 1931 order that petitioner paid and bore unjust, unreasonable and excessive freight charges, and the finding in the 1939 order to the same effect. (R. 116, 125)

The Supreme Court of Illinois has repeatedly held that general conclusions respecting the ultimate issue in the case are insufficient to support an order of the Commerce Commission, and that supporting findings must be made. *Chicago Railways Co.* v. *Commerce Commission,* 336 Ill. 51, 63; *Brotherhood* v. *New York Central R. R. Co.,* 339 Ill. 201, 209; *Louisville & Nashville R. R. Co.* v. *Commerce Commission,* 353 Ill. 375, 377. The Court has also held that resort may not be had to discussion of evidence contained in an order of the Commission to supply the deficiencies in the findings. *Peoples Fruit Ass'n.* v. *Commerce Commission,* 351 Ill. 329, 332-3.

Since the only findings made in the orders of the Commission with respect to the reasonableness of the rates under attack are mere conclusions, the reparation award is void and ineffective under the authorities above cited.

**2. Even if the discussion of the evidence be treated as a series of findings, it is insufficient to support the award.**

For the purpose of this point we shall assume (but do not admit) that the discussion of the evidence contained in the 1931 and 1939 orders is a series of findings, and shall omit reference to discussion of evidence which has no bearing on petitioner's claim.*

A reading of the orders discloses three possible bases for the final conclusion that the assailed rates were excessive: (1) a comparison of the percentage of increase of the rates complained of with the percentage of increase of rates in Illinois generally from 1917 to some undisclosed later date; (2) comparisons of the rates complained of with other rates voluntarily established by carriers or prescribed by regulatory bodies; and (3) the Commission's statement that "While it does not appear from the record, the inference may be drawn that the defendants complained of in this proceeding—other than The Chicago and Alton Railroad Company and The Pennsylvania Railroad Company—did effect and adjust the claims and demands of the petitioners against such defendants." (R. 104-15, 121)

*Percentage increase comparison*: The comparison of percentage increases, as the Commission itself said, "is not, of itself, evidence that any rate is too high or too low or is unjustly discriminatory." (R. 105) See *Atchison, T. & S. F. Ry. Co.* v. *Commerce Commission,* 335 Ill. 624, 631; *Chicago & Eastern Illinois Ry. Co.* v. *Commerce Commission,* 343 Ill. 117, 125.

*Rate comparisons*: The second possible basis for the Commission's final conclusion—comparison of the as-

* For example, we shall not refer to the Commission's discussion of rates and transportation conditions on traffic from Lincoln, or to Atlanta, Shirley and Waynesville, since petitioner's shipments all originated at Springfield and moved to Funks Grove and McLean.

sailed rates with other rates—is the customary method, but the Supreme Court of Illinois has held that such comparisons may not be made unless findings are made which show that the transportation conditions affecting the rates used for purpose of comparison are substantially similar to the transportation conditions affecting the rates complained of. *Atchison, T. & S. F. Ry. Co.* v. *Commerce Commission,* 335 Ill. 624, 636; *Chicago & Eastern Illinois Ry. Co.* v. *Commerce Commission,* 341 Ill. 277, 284-5; *Chicago & Eastern Illinois Ry. Co.* v. *Commerce Commission,* 343 Ill. 117, 125. The Court in these cases specifically held that the transportation conditions must be set forth in specific findings in the order, and that findings showing distances, rates and earnings are not a sufficient basis for determination of the reasonableness of rates.

The only discussion relating to transportation conditions is found in the 1931 order, where the evidence before the Commission is described as follows:

> "The evidence concerning transportation conditions is voluminous and covers several hundred pages of testimony and includes statements showing the grades, degree of curves, the ruling grade, the maximum grades, the weight of rail, the kind of ballast, the traffic density, the assembling service, the average loading per car, the class of equipment used, the type of locomotive, the service at origins and destinations, and other conditions incident to the transportation services. The operating evidence submitted covers in detail operating conditions between many points in Illinois, Indiana and Ohio, and generally covers the lines over which rates used for comparative purposes apply." (R. 114)

In its discussion of the assailed rates the Commission stated that a single-line haul was involved, and that the annual movement of coal to the points of destination

concerned was not heavy. (R. 104-5) It discussed in general language the assembling and handling of cars at the mines at Springfield, stated that pusher service was required at Lawndale for trains of fifty cars or more, and said that the line of the Chicago and Alton was a double-track line on which northbound trains did not have to be sidetracked. (R. 113) The Commission further stated that there did not appear to be any unusually difficult operating conditions except the grade at Lawndale, but added "that the destination points are small stations to which the volume of tonnage is not large, that the movement is in local freight trains, and cannot be compared in volume to the tonnage received at many of the consuming points shown in rate comparisons." (R. 114-15) Nowhere in the order are there any findings showing the grades, degree of curves, ruling grade, maximum grade, weight of rail, kind of ballast, traffic density, class of equipment used, or types of locomotives employed in handling coal from Springfield to McLean and Funks Grove.* Thus the Commission, although it admits having the evidence before it, failed to make complete findings of fact showing all the transportation conditions affecting the handling of traffic under the rates assailed. This alone is a fatal defect.

The discussion of the compared rates is even more barren of facts showing transportation conditions. For the most part, such statements as are made are limited to rates, distances and earnings. (R. 105-13) The grades, degree of curves, ruling grades, maximum grades, weight of rail, kind of ballast, traffic density, assembling service, class of equipment used, types of locomotives, and the service at origins and destinations are nowhere stated. In the absence of specific findings

* For a discussion showing the importance attached by the Supreme Court of Illinois to some of these operating conditions see *Atchison, T. & S. F. Ry. Co.* v. *Commerce Commission*, 335 Ill. 624, 636-38, 640-43, 645-46.

showing the conditions of operation under the assailed and compared rates, the conclusion of the Commission that the rates under attack were excessive cannot rest on rate comparisons.

In its order of May 26, 1931, the Illinois Commerce Commission said:

> "Careful consideration has been given to the circumstances and conditions surrounding the movement of coal from * * * Springfield to the points in issue and also the rate comparisons and the transportation conditions surrounding the movement of coal between various points in Illinois, Indiana and Ohio." (R. 115)

The Commission cannot avoid the requirement laid down in the authorities above cited that it must make findings of fact showing the transportation conditions encountered by a statement that it gave them careful consideration.* In *Public Utilities Commission* v. *Springfield Gas Co.*, 291 Ill. 209, 235, the Court, in reviewing a rate order involving a valuation of property, held that a statement by the Commission that it had taken into consideration certain elements of value would not excuse its failure to make findings showing what those elements were.

*Compromise by other carriers*: The third possible basis on which the Commission may have rested its final conclusion falls by its own weight. In the first place, the Commission admits that the necessary evidence did not appear of record. (R. 121) In the second place, the fact, if it be one, that other carriers compromised and settled the reparation claims against them obviously could not properly have been given any weight by the Commission.

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* In the statement quoted from the 1931 order the Commission states that it considered transportation conditions affecting rates in Illinois, Indiana and Ohio, and thereby impliedly admits that it gave no consideration whatever to the transportation conditions affecting rates in Missouri, Iowa, Wisconsin, Michigan, West Virginia and Pennsylvania, although rates in these six states are also discussed. (R. 105-13)

## IV.

**The reparation award is arbitrary and unreasonable because the Illinois Commerce Commission failed to test the reasonableness of the assailed group rates by average group distances.**

In its order of May 26, 1931 the Illinois Commerce Commission said:

> "Several of the exhibits introduced by defendants show group rates and the average distance from the group. *A comparison of this kind* [*i. e.,* a comparison based on the average distance from the rate group] *is proper when group rates are used.* The assailed rates apply from the Springfield group to the destinations here involved and defendants have introduced evidence purporting to show rates from the entire Springfield group. This group extends from Lincoln on the north to Carlinville, Illinois, on the south. It also includes mines on the Nickel Plate Railroad at Coffeen, Panama and Sorento, and from mines on the Chicago and Illinois Midland Railway from Calloway to Taylorville, Illinois, inclusive. The average distance from Springfield proper to stations on the Chicago and Alton Railroad, Atlanta to Shirley, inclusive, is 46 miles." (R. 109; italics ours.)

Reference to the map introduced in evidence as Exhibit E will show the extent of the Springfield rate group. (R. 215) Carlinville, one of the points referred to, is a point on the Chicago and Alton railroad (now the Alton railroad) about forty miles south of Springfield; and the mines at Sorento, one of the points on the Nickel Plate (N. Y. C. & St. L.) referred to, are approximately sixty miles south of Springfield. (R. 215) As the Commission stated, the rate to a given destination from every origin in the entire Springfield group was the same. Petitioner's shipments moved from the mines at

Springfield proper in the northern part of the Springfield group where the distances to McLean and Funks Grove were obviously much shorter than the average distance from all mines in the group. (R. 215)

The group principle of rate-making has obvious advantages to producers and coal dealers; for under the group principle all producers in the rate group can ship to the same market at the same rate, and the coal dealers at the market are able to solicit bids from all mines. The reasonableness of a group rate, as the Illinois Commission expressly stated, should be tested by the average distances from all mines in the group. This is also the view of the Interstate Commerce Commission. *Jackson Traffic Bureau* v. *Alabama G. S. R. Co.,* 186 I. C. C. 57, 59. Any other method is arbitrary and unreasonable.

The Illinois Commission does not, in either of its orders, make any mention of the average distance from all mines in the Springfield group to any of the various destinations. In its order of May 26, 1931, the Commission states the distances from Springfield, Illinois, to the destinations here involved. (R. 104) In the excerpt quoted above from the order (*supra,* p. 29), the Commission stated the average distance from Springfield itself (not from all mines in the Springfield group) to the Chicago and Alton destinations. Its failure to even mention the average distances from all mines in the Springfield rate group to McLean and Funks Grove is conclusive evidence that it gave no consideration to the average distances from the group. The Commission would have had to make findings showing the average distances from all mines as a basis for comparisons predicated thereon. (See point III, *supra,* pp. 23, 24, 26.)

In *Chicago, Rock Island & Pacific Ry. Co.* v. *United States,* 284 U. S. 80, this Court had before it an order of the Interstate Commerce Commission in which, after

finding that all railroads were entitled to receive a fixed rental for the use of their cars by foreign lines, the Commission granted exemptions to short-line railroads. This Court held that portion of the order was arbitrary and unreasonable because it did not conform to the rule laid down by the Commission itself for all railroads.

The Illinois Commission's order of May 26, 1931, has the same vice. In the face of its own unqualified statement that comparisons based on the average distance from the rate group were proper in the case of group rates, the Commission proceeded to ignore its own standard. It follows that the 1931 order is arbitrary and unreasonable. Since that order is the foundation on which the reparation award of March 17, 1939, was entered, the award is also void.

## CONCLUSION.

For the reasons stated above, we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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